NO. 47978-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANDREW MERKEL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Stanley Rumbaugh

No. 14-1-03467-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State present sufficient evidence of Defendant intending to assault Mike Wittenberg when testimony established that Defendant dragged Mr. Wittenberg alongside a moving vehicle for over 20 yards while fleeing the scene?

2. Has Defendant demonstrated that he received ineffective assistance of counsel when defense counsel declined to object to the imposition of discretionary LFOs and instead negotiated a joint sentencing recommendation?

3. Does this court have discretion to award appellate costs to the State if it prevails in this appeal?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Andrew Merkel (hereinafter "Defendant") with one count of burglary in the first degree (RCW 9A.52.020(1)). Defendant was convicted as charged after a jury trial. CP 32. At sentencing, the State and defense counsel made a joint recommendation of a 100 month standard range sentence and the imposition of $500 in discretionary legal financial obligations (LFOs) for Department of Assigned Counsel (DAC)

recoupment; the trial court adopted the recommendation. 8/28/15 RP 5-7. Defendant filed a notice of appeal. CP 53.

2. Facts

On August 22, 2014, Denise Ingram was working in her home office when she noticed Defendant in her neighbor's yard across the street. RP2 11-12. Defendant approached the front door of the home and knocked. RP2 12. When no one answered, he knocked again. RP2 12. No one answered after the second knock and Defendant grabbed the door knob and attempted to enter the home. RP2 12. Ms. Ingram then called the owner of the residence, Robin Wittenberg, and asked if she was expecting anyone at her home that day. RP2 13. Ms. Wittenberg responded that she was not expecting anyone to be at her home that day other than her husband. RP2 13.

While Ms. Ingram was on the phone with Ms. Wittenberg, Defendant peered into a window next to the front door. RP2 14. He then walked to the side of the house and entered the backyard through a side gate. RP2 14. At that point, Ms. Ingram ended her call with Ms. Wittenberg and called 911. RP2 14.

While Ms. Ingram was on the phone with the 911 dispatcher, Ms. Wittenberg's husband, Mike Wittenberg, pulled into his driveway. RP2 15; RP2 50. Mr. Wittenberg exited his car and entered his house through the front door. RP2 51. At that point, Ms. Ingram decided to run across the

street and warn Mr. Wittenberg that an unknown person had entered his backyard through the side gate. RP2 16. By the time Ms. Ingram ran across the street to the Wittenbergs' front yard, Mr. Wittenberg had already entered the home. RP2 16.

After entering his home, Mr. Wittenberg walked through the living room, exited the home through a sliding door on the back of the house, and went into his shop in the backyard. RP2 51. After being in his shop for about 30 seconds, Mr. Wittenberg re-entered his home through the same sliding door he had used to enter the backyard. RP2 51. At that point, he heard a rustling noise coming from one of the bedrooms down the hall. RP2 52. Mr. Wittenberg walked down the hall and observed Defendant going through the drawers of a dresser in the master bedroom. RP2 52-53. Defendant immediately fled out of a sliding door in the bedroom. RP2 54.

Mr. Wittenberg ran through the house and out the front door in an attempt to catch Defendant in the front yard as he fled. RP2 55. When he exited the house, Ms. Ingram was standing in the front yard on the phone with 911. RP2 16-17; RP2 55. Defendant came running through the gate on the side of the house and Mr. Wittenberg chased him down the street toward a vehicle parked on the side of the road. RP2 17-18; RP2 56. Defendant entered the vehicle that had been parked outside the Wittenberg's residence and shut the door. RP2 18; RP2 61. The driver's side window was rolled down and Mr. Wittenberg reached in the window in an attempt to remove the keys from the ignition. RP2 18-19; RP2 62.

Although Mr. Wittenberg was not able to reach the keys, he was able to grab the steering wheel. RP2 62.

As he was holding the steering wheel, Mr. Wittenberg told Defendant "You're not going anywhere." RP2 62. Defendant then smirked, shifted the car into reverse, and accelerated backwards. RP2 20; RP2 62. As Defendant accelerated in reverse, Mr. Wittenberg's arm was caught in the steering wheel. RP2 63. Mr. Wittenberg was knocked off of his feet and dragged alongside the car for over 20 yards. RP2 20; RP2 63-64. Defendant continued driving in reverse towards a planter in a neighbor's yard but stopped just before hitting it and Mr. Wittenberg was able to remove his arm from the vehicle. RP2 20; RP2 64. Defendant then drove away from the scene. RP2 20; RP2 65. Mr. Wittenberg was able to read the vehicle's license plate number as Defendant drove away and shouted it to Ms. Ingram who was still on the phone with 911. RP2 65-66.

Defendant had already fled the scene by the time law enforcement arrived at the Wittenberg residence so Officer Johnston of the Bonney Lake Police Department canvassed the surrounding neighborhood looking for him. RP2 108; RP2 143-144. Officer Johnston was driving on Bonney Lake Boulevard and saw a vehicle matching the description provided by Mr. Wittenberg driving the opposite direction. RP2 145. The vehicle's license plate number was the same as the one Mr. Wittenberg had relayed to Ms. Ingram and the driver of the vehicle matched the description of the person who had been inside the Wittenberg residence. RP2 145-148.

Officer Johnston began to turn her patrol car around to pursue the suspect vehicle but Defendant fled at a high rate of speed and could not be located. RP2 149.

Around the time Officer Johnston lost sight of the suspect vehicle, Bonney Lake resident Sharon Wells was in her backyard when she heard sirens approaching. RP3 41. Ms. Wells then heard squealing tires and a loud "thump." RP3 42. A car matching the description of the vehicle that had fled the Wittenberg residence then sped by her home. RP3 42. Ms. Wells noticed that her mailboxes had been knocked off the red poles holding them up in her yard. RP3 44.

Police were able to determine that the owner of the suspect vehicle was Nancy Martin using the license plate number identified by Mr. Wittenberg and Officer Johnston. RP3 24-25. Ms. Martin is Defendant's grandmother and he was living with her at the time the Wittenberg residence was burglarized. RP3 24-25. Police visited Ms. Martin's residence and the suspect vehicle was parked in her driveway. RP3 25. Officers noticed marks on the front of the vehicle that appeared to be red paint from another surface. RP2 123-125.

After being dragged, Mr. Wittenberg had scrapes and abrasions on his legs and the arm that was caught in the steering wheel was sore. RP2 24; RP2 66-68. Additionally, a necklace and some other pieces of jewelry were missing from the Wittenbergs' master bedroom. RP2 71. Mr.

Wittenberg was shown a photomontage and identified Defendant as the man who had been in his house on August 22, 2014. RP3 31.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT INTENTIONALLY ASSAULTED ANOTHER PERSON BY ESTABLISHING THAT DEFENDANT LOOKED DIRECTLY AT MIKE WITTENBERG, SMILED AT HIM, AND THEN DRAGGED HIM ALONGSIDE A CAR WHILE FLEEING THE SCENE TO FORCE MR. WITTENBERG TO LET GO OF THE STEERING WHEEL.

To prevail on a challenge to the sufficiency of the evidence, a defendant must show that no rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. ***State v. Allen***, 159 Wn.2d 1, 7, 147 P.3d 581 (2006) (citing ***State v. Finch***, 137 Wn.2d 792, 835, 975 P.2d 967 (1999)). All inferences from the evidence are to be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Gentry***, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). "[A] defendant who claims insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence." *Id.*

"A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the

building or immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person." RCW 9A.52.020(1). Washington recognizes three definitions of assault: "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." ***State v. Elmi***, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

Assault by attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury. ***State v. Byrd***, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Specific intent cannot be presumed but can be inferred from all the facts and circumstances involved in a case. ***State v. Yarbrough***, 151 Wn. App. 66, 87, 210 P.3d 1029 (2009) (citing ***State v. Wilson***, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)). "A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

The State presented sufficient evidence for a reasonable trier of fact to conclude that Defendant intentionally assaulted Mr. Wittenberg by dragging him alongside the car while fleeing the scene. The State's evidence regarding the assault consisted of testimony from Mr. Wittenberg and Ms. Ingram. When viewed in a light most favorable to the State, this evidence establishes that Defendant formed the specific intent to cause

fear and apprehension of bodily injury in Mr. Wittenberg before dragging him alongside the car.

The circumstances surrounding Defendant's flight from the Wittenberg residence permit a reasonable trier of fact to conclude that Defendant assaulted Mr. Wittenberg while in flight from the scene of a burglary. Defendant had just exited the Wittenberg's house and was attempting to flee the scene in a car he had parked down the street. RP2 18-19; RP2 56. Mr. Wittenberg attempted to prevent Defendant from fleeing but was only able to grab the steering wheel through the open driver's side window after Defendant had already entered the car. RP2 19; RP2 62-63. Mr. Wittenberg then told Defendant "you're not going anywhere." RP2 62. In response, Defendant smirked before moving the car. RP2 62. Based on this evidence, a reasonable trier of fact could infer that Defendant was aware Mr. Wittenberg was actively attempting to prevent him from leaving and that in order to flee, he needed to somehow separate Mr. Wittenberg from the car.

Defendant's actions after entering the car corroborate this inference. Instead of pulling forward to flee the scene, Defendant put the car in reverse and accelerated backwards towards a planter in a neighboring yard. RP2 20; RP2 64. Driving in reverse into the other yard served no purpose other than inflicting bodily injury on Mr. Wittenberg by dragging him alongside the car and putting him in fear of further injury so that he would release his grip on the steering wheel. Once Mr. Wittenberg

let go of the steering wheel and was removed from the car, Defendant immediately shifted the car into drive and fled the scene. RP2 20; RP2 64-65. This sequence of events reflects Defendant's intent to force Mr. Wittenberg away from the car by putting him in fear of further bodily injury as he was being dragged alongside an accelerating car.

Defendant's act of shifting the car into reverse and driving into another yard was intentional and meant to place Mr. Wittenberg in fear of injury. A reasonable trier of fact could conclude that Defendant assaulted Mr. Wittenberg in immediate flight from a burglary. The State presented sufficient evidence of each element of burglary in the first degree at trial and therefore Defendant's challenge to the sufficiency of the evidence fails.

2. DEFENDANT HAS FAILED TO ESTABLISH THAT HE WAS PREJUDICED BY DEFENSE COUNSEL'S CHOICE NOT TO OBJECT TO THE IMPOSITION OF $500 IN DISCRETIONARY LFOs.

To demonstrate a denial of the effective assistance of counsel, a defendant must satisfy a two-prong test. First, they must show that his attorney's performance was deficient. ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, 733 (1986) (quoting ***Strickland v. Washington***, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). This prong requires showing that his attorney made errors so serious that he did not receive the "counsel" guaranteed to defendants by the Sixth Amendment.

Id. Second, the defendant must demonstrate that he was prejudiced by the deficient performance. *Id.* Satisfying this prong requires the defendant to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 672-3, 101 P.3d 1 (2004). A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the trial. ***Strickland***, 466 U.S. at 694.

When asserting that an attorney's performance was deficient, a criminal defendant must show that the attorney's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. Judicial scrutiny of an attorney's performance must be highly deferential. *Id.* at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance..." *Id.* In evaluating an attorney's performance, courts must make every effort to eliminate the distorting effects of hindsight. *Id.* Counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. ***Davis***, 152 Wn.2d at 673.

Regarding the second prong, the "defendant must affirmatively prove prejudice, not simply show that 'the errors had some conceivable effect on the outcome.'" ***State v. Crawford,*** 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting ***Strickland***, 466 U.S. at 693). "In doing so, 'the defendant must show that there is a reasonable probability that but for

counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Similarly, "[t]he defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *Id.* at 337 (citing ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Defendant's sentencing hearing encompassed two separate cases. Defendant was sentenced for this case and a more recent one where he pleaded guilty to one count of residential burglary, two counts of possession of stolen property in the second degree, and one count of unlawful disposal of human remains (Cause No. 15-1-00118-5). 8/28/15 RP 3-4. The only discretionary LFO imposed as part of Defendant's sentence on either case is $500 for DAC recoupment, which was imposed as part of the sentence in this case. CP 44. The parties made a joint recommendation to the trial court suggesting $500 as an appropriate amount. 8/28/15 RP 5-6. The trial court waived discretionary LFOs on the second case. 8/28/15 RP 10.

Defendant has failed to show that defense counsel's performance was deficient. Defense counsel's sentencing recommendation was the

result of negotiations with the State and took into account the fact that Defendant was being sentenced for multiple convictions stemming from two separate incidents. 8/28/15 RP 6-8. As a result of these negotiations, the State and defense counsel presented the trial court with a joint recommendation. 8/28/15 RP 6. On appeal, Defendant asserts that failing to object to this joint sentencing recommendation constitutes ineffective assistance of counsel. Br. of App. at 10.

The record establishes that defense counsel did not object to the imposition of the $500 DAC recoupment because that LFO was included in a sentencing recommendation he had negotiated with the State. Defense counsel negotiated with the State to secure a joint sentencing recommendation that included $500 in discretionary LFOs to compensate the DAC for its services on two separate cases, including one that proceeded to trial. The choice to negotiate this sentencing recommendation was a strategic decision by defense counsel to avoid a more severe sentence that could result had the parties not presented the trial court with a joint recommendation.

Defendant has failed to establish that his sentence would have been different had defense counsel objected to the imposition of the $500 in DAC recoupment. Before he was sentenced, Defendant informed the trial court that he intended to return to Alaska to work upon his release from custody and that he had worked there in the past. 8/28/15 RP 9. After hearing Defendant's plan, the trial court adopted the joint recommendation

to include $500 in DAC recoupment as part of his sentence. 8/28/15 RP 10. However, given that Defendant had not recently been employed, the trial court also declined to impose any discretionary LFOs as part of his sentence for the other convictions. 8/28/15 RP 10. The record demonstrates that the trial court did take Defendant's financial situation into account when it included $500 in discretionary LFOs as part of his sentence. There is no reasonable probability that Defendant's sentence would have been different had defense counsel objected to his own sentencing recommendation.

3. THE STATE HAS NOT REQUESTED AN AWARD OF APPELLATE COSTS AND THIS COURT HAS THE DISCRETION TO AWARD THEM ONCE A COST BILL HAS BEEN FILED.

At this point, the State has not requested an award of appellate costs should it prevail in this appeal. Defendant was found indigent at sentencing, but also informed the court that he had worked in the past and would be able to work in the future. 8/28/15 RP 9; 8/28/15 RP 13. The State agrees with Defendant that this court has the discretion to grant or deny a request for appellate costs once a cost bill has been filed. ***State v. Nolan***, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). Should the State prevail in this appeal and file a cost bill, the decision of whether to award appellate costs is the prerogative of this court in the exercise of its discretion under RCW 10.73.160 and RAP 14.2.

D. CONCLUSION.

The State presented sufficient evidence for a reasonable trier of fact to find all the elements of the crime of burglary in the first degree beyond a reasonable doubt. Additionally, Defendant has failed to meet his burden to establish that his attorney's performance was deficient and that he was prejudiced by that performance. Finally, the State has not requested an award of appellate costs at this time but this court has the discretion to award them should a cost bill be filed. Defendant's conviction and sentence should be affirmed.

DATED: May 13, 2016

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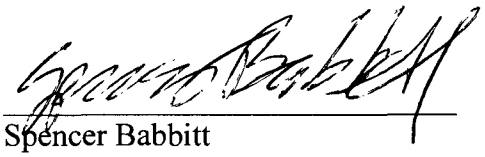

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